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United States of America

In the Supreme Court of the United States

October Term 1943

No. 573

HERBERT OTTO SCHUCHARDT,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Brief Opposing Petition for Writ of Certiorari to Supreme Court of the State of Michigan

Herbert J. Rushton,
Attorney General for the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General for the State of Michigan
Counsel for Respondent.

Edmund E. Shepherd,
(Solicitor General for the State of Michigan, Of Counsel on the Brief).

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INDEX

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Brief Opposing Petition for Certiorari.[1]

I.

Question Presented.

As defined by petitioner's counsel (p. 5), the question presented is

> "whether a conviction in a case in which defendant has been prevented by state officers from securing counsel and has been induced by persuasion and promises to waive preliminary hearing and to plead guilty and has been misinformed of the nature of the offense and not been informed by the court of his

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[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

constitutional right to counsel, and has not been adequately informed by the court of the nature of the charge and where evidence obtained by illegal search has been used by the court in arriving at a judgment and where the alleged political beliefs of the defendant have influenced the judgment of the court is valid under the Fourteenth Amendment of the Constitution of the United States".

Our objection to the foregoing statement is that the record does not sustain the premises of the question propounded.

II

Basis of Jurisdiction.

We take the position that the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code, § 237-b, as amended (28 USC, § 344-b).

1. The claims of federal constitutional right were not specifically raised and set up by the petition for leave to file a motion for new trial in the circuit court (8).

2. Since no specific federal constitutional rights were there asserted (5-6), the Supreme Court of the State of Michigan by refusing discretionary leave to appeal,[2] did not affirm a denial of such rights.

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[2]

The Michigan Code of Criminal Procedure (Chapter 10, § 3 [3 Comp. Laws 1929, § 17357 Stat. Ann. § 28.1100]) provides:

"Sec. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application therefor".

III

Counter-Statement of the Case.

We are unable to accept counsel's 'Summary Statement of Matters Involved' (petition, pp. 1-4) or his 'Statement of the Case' (petition, pp. 9-11), and we note the following errors therein:

1. These statements seem to proceed on the theory that the trial court was bound to accept as true the allegations set forth in petitioner's application for leave to file a motion for new trial. Such allegations were denied by counter-affidavits (14-17).

2. It is said (petition, p. 2) that during the time petitioner was kept in a room by the sheriff, 'he was continuously interrogated by the assistant prosecuting attorney of Midland county, the sheriff and other officers' (7).

> "He was not permitted to obtain a lawyer, and was informed that he would not be permitted to leave the room until he had signed a confession, and was intimidated and threatened to a point where he was not able to exert his own will power".

This statement is based upon an affidavit of the petitioner (7), in support of his petition for leave to file a motion for a new trial.

But this affidavit was signed and verified in Jackson, Michigan, on the day the petition was denied, and it was

not filed with the court until the day after the petition had been denied (See, supplemental record).

Counsel has been gracious enough to stipulate to the foregoing fact, and to agree that the assistant prosecuting attorney may file a counter-affidavit.

It now appears from the affidavit of the assistant prosecuting attorney that he was not present in the room to which petitioner was confined, and that he did not participate in questioning him (See, supplemental record).

3. It is alleged that petitioner was not informed of the nature of the charge against him (petition, p. 2), but the record of the proceedings before the circuit judge clearly indicates that the nature of the charge was explained by the trial judge, and the information itself was read to petitioner (18-21). Petitioner expressed a desire to plead guilty:

> "**The Court**: I have been informed also that you desire, that you want to plead to the information that is filed against you by the prosecutor?
>
> **Mr. Schuchardt**: Yes, sir.
>
> **Court**: Then you want to come in and plead to the charge as I understand it and not wait any longer. That is your desire?
>
> **Mr. Schuchardt**: Yes." (19).

The court then advised petitioner to 'listen carefully to the prosecutor as he reads the complaint (information) and see that you understand it thoroughly and know what it is and then I will ask you to plead. The prosecutor

will read the information to you and then see that you understand it thoroughly' (19).

Whereupon the prosecuting official read the information to the petitioner (19-20), and the court inquired if petitioner understood 'the charge made against you', and he replied, 'Yes, sir' (20).

> "**The Court:** The charge is larceny from a private apartment, entering the private apartment with the intent to commit a larceny, that is to steal. You understand the charge?
>
> **Mr. Schuchardt:** Yes.
>
> **Court:** If you desire to plead guilty to the charge and you know about that, you will simply say that you are guilty. If not and you want to stand trial, you plead not guilty, and go before the jury. If you don't plead guilty or not guilty, and you, what they say stand mute, the court will enter a plea of 'Not Guilty' on your behalf on the records of the court and then you stand trial. You understand now?
>
> **Mr. Schuchardt:** Yes, I understand.
>
> **Court:** Are you ready to plead?
>
> **Mr. Schuchardt:** I am ready to plead guilty (20).

Then, as an added precaution, the trial judge took the accused to his private office, and, having interviewed him, said:

> "**Court:** I have talked with Mr. Schuchardt privately and I accept his plea of guilty as having been made of his own free will, of his own desire, without

any undue influence, and I will accept his plea'' (20-21).

4. Counsel states that petitioner 'was then taken to the jail at Bay City, Michigan, and there confined up to the time of his trial' (petition, p. 3).

While this fact does not appear of record, we should probably explain that Midland county has no jail (only a police cell), and that its prisoners are accommodated in the county jail at Bay City, only a few miles distant. Moreover, it may be observed that petitioner was not so confined until the time of his 'trial', but having pleaded guilty, he was so imprisoned until the time of sentence.

5. It is said that on January 26

> ''petitioner was brought before the court for sentence he was not represented by counsel and was not advised by the court that he had the right to be so represented. No further information was given him as to the nature of the charge (21) and he was sentenced to imprisonment for a minimum term of four years and ten months under a statute by the terms of which the maximum sentence is five years'' (petition, p. 4).

It should be added that when brought before the court for sentence, the prisoner was asked if he desired 'at the present time to be sentenced' (21), and he replied, 'Yes, sir' (21-22). Asked if there was anything he desired to say before sentence was pronounced, and told that he might speak freely, petitioner replied as follows:

> **''Respondent:** Only I want to say is I am very sorry what I have done.

The Court: What's that?

Respondent: Only I want to say I am very sorry what I have done, and if the court will be lenient with me I will do everything in my power to redeem myself'' (22).

And again, the court explained the seriousness of the charge of 'breaking feloniously in the private apartment of another'. He then pronounced sentence.

6. Counsel claims that on the hearing before the trial judge, on the petition for leave to file a motion for new trial, no 'evidence' was taken. But the record discloses no request to take testimony, and it is apparent that the court was guided by the credibility of the several affiants.

7. In his 'Statement of the Case' (petition, pp. 9-11), counsel asserts that state officers went to Milwaukee, Wisconsin, and there illegally searched the premises of petitioner's home, unlawfully obtaining possession of the stolen rifle. But it should be added that the record does not disclose that the property thus obtained was offered or received in evidence by the court below. No prejudice ensued.

8. It is said:

''The court refers to statements by various persons obtained by the probation officer in Wisconsin to the effect that petitioner had made statements indicating that he was in favor of the German Government. The extremely severe sentence given to petitioner, who was a first offender, for a comparatively minor offense can be explained only by the effect which the extraneous matter concerning petitioner's political beliefs had on the mind of the court''.

There is absolutely nothing in the record to sustain such a statement.

9. Since petitioner's counsel emphasizes the alleged fact that petitioner was denied counsel, and that his federal constitutional rights were infringed, it is permissible to point out that, while petitioner claims to have been greatly shocked at the sentence pronounced upon him, he took no steps to obtain relief under the Michigan code of criminal procedure, until approximately three months and 15 days after judgment. Sentence was pronounced (21-22) on the 26th day of January 1943; and petitioner's application for leave to file a (dilatory) motion for new trial was presented to the court on the 11th day of May 1943 (2).

IV

Reasons for Opposing Allowance of Writ.

We oppose allowance of the writ, on the following grounds:

1st. The Supreme Court of the State of Michigan, a court of last resort on appeal, has not decided a federal question at all, much less has it decided a federal question in conflict with applicable decisions of this court.

2nd. It is manifest that the Supreme Court of the State of Michigan denied leave to appeal, solely on local grounds.

3rd. There is no merit to petitioner's contention that he has been denied any of his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

Argument.

Point One

The federal question now presented was not raised in the court below, and the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code.

The petition on file in this cause falls short of presenting a federal question raised in the courts below:

First: Counsel relies upon the provisions of § 237-b of the Judicial Code, as amended (28 USC, § 344-b), the pertinent provisions of which are:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there shall be certified to it for review and determination, . . . any cause wherein a final judgment . . . has been rendered by the highest court of a State in which a decision could be had . . . *where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution* (etc.)".

Where, as in the present instance, a state court has refused to take jurisdiction (grant an appeal), and its judgment does not decide a federal question, the foregoing section does not apply,

Semple v. Hagh, 4 Wall. (71 U.S.) 431.

So, too, this court will not review the judgment of a state court where it is clear that decision was based on other than federal grounds,

Harding v. Illinois, 196 U.S. 78,

and the federal right must have been set up and adjudicated by the judgment of the state court,

Cleveland & P.R. Co. v. Cleveland, 235 U.S. 50.

Such a question is not available here if not presented and ruled upon in the state supreme court, although it was raised in the trial court,

Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U.S. 341.

And a writ of certiorari will be dismissed where the record fails to disclose that the complaining party definitely raised the federal question in the state court,

Missouri Pac. R. Co. v. Hanna, 266 U.S. 184.

In order to raise a federal question the federal right must be asserted according to the state procedure,

Louisville & N.R. Co. v. Woodford, 234 U.S. 46.

Second: In his petition for leave to file a motion for new trial in the circuit court (8-12), the petitioner made no mention of the Constitution of the United States, and he asserted no federal rights as such.

Third: Nor did he assert such rights, or raise federal questions in his application for leave to appeal addressed to the Supreme Court of the State of Michigan (1-6).

At the close of that application (5), the petitioner raised certain questions, presented as follows:

> "Respondent further shows that prejudicial error was committed by said court in the trial of said cause and in the denial of the motion for leave to file a motion for new trial and for a new trial, in the following particulars:
>
> **1.** In failing to inform respondent of his right to have counsel for his defense.
>
> **2.** In denying respondent his constitutional right to due process of law by failing to advise him of his right to counsel.
>
> **3.** In adjudging respondent guilty without hearing any evidence.
>
> **4.** In denying respondent's constitutional right against self incrimination by using in evidence articles obtained by illegal search and seizure.
>
> **5.** In basing the judgment and sentence in part on matters not in evidence and on highly prejudicial hearsay statements without affording respondent any opportunity to refute them by evidence.
>
> **6.** In denying the motion for leave to move for a new trial and in denying a new trial" (5, 6).

The Constitution of the State of Michigan provides that in every criminal prosecution, the accused 'shall have the right . . . to have the assistance of counsel for his defense' (article 2, § 19), and that 'the person, houses,

papers and possessions of every person shall be secure from unreasonable searches and seizures' (article 2, § 10).

In absence of reference to the Federal Constitution, the court below would have the right to assume that the 'constitutional rights' to which reference was made were those safeguarded by the State fundamental law.

Our attention has been directed to no authority sustaining the view that, under the Constitution of the United States, an accused person who comes into court with the avowed intent to plead guilty, is entitled to be informed that he is entitled to counsel. The Sixth Amendment merely guarantees the right to 'have the assistance of counsel *for his defense*'.

Nor are we informed concerning any constitutional guarantee that an accused person, when pleading guilty is entitled to have testimony adduced by the State.

There is nothing in the record to show that the trial judge, in pronouncing sentence and admeasuring punishment, was influenced by prejudicial hearsay statements.

And the granting of leave to file a dilatory motion for new trial, lay in the discretion of the court.

Fourth: Since the time had long expired when, under the code of criminal procedure (Chapter 10, § 2 [3 Comp. Laws 1929, § 17356: Stat. Ann. § 28.1099]), a motion for a new trial should have been made, and since the granting of leave to file such a dilatory motion was a matter of grace rather than right,

People v. Hurvich, 259 Mich. 361,

People v. Burnstein, 261 Mich. 534,

it is quite likely that the Supreme Court of the State of Michigan rejected petitioner's application for leave to appeal on that ground.

We, therefore, respectfully submit that the rulings below do not bring the case within the jurisdictional provisions of the Judicial Code.

Point Two

There is no merit to petitioner's contention that he has been denied any rights guaranteed him by the Fourteenth Amendment to the Federal Constitution.

Petitioner's several contentions, 'A' to 'F', inclusive (petition, pp. 12-24), may, in view of the record, be treated summarily.

'A' Allged illegal detention:—Counsel complains that petitioner was held in custody, without warrant, and denied the statutory privilege of being taken before an examining magistrate. The period of such custody was merely four hours, and petitioner was then taken before a magistrate where he waived preliminary examination. He says that he was induced to do so by the sheriff. The answer is 'the law is well settled that the due-process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings',

People v. McCrea, 303 Mich. 213, 248 (certiorari denied by this Court, 318 U.S. 783), citing

Woon v. Oregon, 229 U.S. 586.

The statement that the prosecuting official was present when petitioner was interrogated, and that he informed the accused 'he would not be permitted to leave the room, or to obtain a lawyer, or to get legal advice until he had signed a confession' (7), is found in petitioner's affidavit; and it is now denied by the prosecuting attorney (see supplemental record).

That the petitioner was fully informed of the nature of the charge, appears from the record of the proceedings before the circuit judge (18-21, and see our statement of the case).

The case does not resemble in any particular,

Ward v. Texas, 316 U.S. 547,

or

Smith v. O'Grady, 312 U.S. 329,

cited in counsel's brief.

In the case of *Ward, supra*, law enforcement officers, acting beyond their authority and in violation of state law, arrested without a warrant an ignorant negro, accused of murder, and took him by night and day to strange towns in several counties; incarcerated him in several jails; and by these means and by persistent questioning, coerced him to confess. The use of the confession at the trial voided the conviction (Syl. 2). The body of the opinion also discloses that the accused 'was beaten, whipped and burned by the officer to whom the confession was finally made'.

Here, we find merely an instance in which an accused person is held for four hours without warrant, 'rushed'

before a magistrate; he waived a preliminary examination, then appears in court and, so far as the court record discloses, voluntarily enters a plea of guilty. When sentenced, he says he is sorry for what he did, and asks leniency on the ground that he will redeem himself (22).

In the case of *Grady, supra,* the accused was tricked into a plea of guilty; after three days in jail, he was taken before a trial judge, 'summarily arraigned, and, upon his prearranged plea of guilty, sentenced, *to his surprise and consternation,* to a term of twenty years imprisonment'.

> "Upon imposition of the twenty year sentence, however, he vigorously protested, asked the court and prosecuting attorney for a copy of the charge to which he had pleaded guilty, and, this request being refused, asked permission to withdraw his plea of guilty, requested appointment of an attorney to advise and assist him, and asked that he be given a proper opportunity to defend himself. All of these requests were refused by the court, and 'within the hour' he was on his way to the penitentiary, accompanied by the sheriff".

In the case at bar, petitioner did not vigorously protest at time of sentence, but expressed his regrets (22).

If surprised and consternated by the sentence imposed upon him, he did not express it at the time but allowed the time within which he might move for a new trial, to go by; and he waited for nearly four [4] months before taking any steps, through his attorney, to obtain relief.

We respectfully submit there is no merit to this contention of petitioner.

'B'. Claimed denial of counsel. Counsel stresses the fact that petitioner was not advised at any time by the court of his constitutional right to have counsel. The Constitution of the United States does not require any such procedure.

And certainly, the facts appearing of record in this case do not even faintly resemble the circumstances disclosed in

Powell v. Alabama, 287 U.S. 45.

'C'. Claim that plea of guilty induced by promises. The gist of the claim, as set forth in the affidavits, is that the accused was told if he would plead guilty he would probably be put on probation. As the Supreme Court of the State of Michigan has observed, 'an accused should not be permitted to speculate upon his sentence and then change his plea after such sentence',

People v. Severn, 303 Mich. 337.

Counsel is mistaken when he intimates that the trial judge, upon hearing the motion for leave to move for a new trial, 'refused to receive testimony and to have the petitioner produced for a hearing'; the record does not bear out this statement.

'D'. Remedies under state law. While, under the law of the State of Michigan, habeas corpus will not be permitted to be substituted for a writ of error,

In re Offil, 293 Mich. 416,

we venture to say, in view of the provisions of Michigan's Constitution (article 7, § 4), that in a case where the pe-

titioner for such a writ alleges that his federal constitutional rights have been violated, the court would be required to consider the petition.

Petitioner's counsel probably took the correct course in applying to the supreme court for leave to appeal; but it does not appear that the highest court of the state decided any question involving a claim of fundamental rights guaranteed by the Constitution of the United States.

'E'. Articles obtained by illegal search. Counsel contends that the alleged illegal search of petitioner's home in Milwaukee, Wisconsin, and the reception of such property (a rifle) in evidence against him, violated his rights under the Constitution of the United States (4th Amendment).

The complete answer is that no property so seized was offered and received in evidence against the petitioner. If it was, the record does not disclose it.

'F'. Alleged political beliefs. Nor does the record reveal that petitioner's alleged political beliefs (in the Nazi form of government), influenced the court.

The record maintains silence on that factor of the case, and petitioner's allegations should not be considered.

VI

Relief Sought.

On the face of this record, we respectfully submit, petitioner is entitled to no relief, and the writ of certiorari should be denied.

Respectfully Submitted,

Herbert J. Rushton,
Attorney General for the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General for the State of Michigan
Counsel for Respondent.

Edmund E. Shepherd,
(Solicitor General for the State of Michigan, Of Counsel on the Brief).